Court File No.

IN THE FEDERAL COURT OF CANADA

IN THE TRIAL DIVISION

B E T W E E N:

GLAD DAY BOOKSHOP INC. and
JEARLD MOLDENHAUER

Applicants

- and -

HER MAJESTY THE QUEEN,
MINISTER of NATIONAL REVENUE and
DEPUTY MINISTER of NATIONAL REVENUE for
CUSTOMS and EXCISE

Respondents

FACTUM

PART I - NATURE OF THE MOTION

1. The Applicants seek an Order for the return of material detained by Canada Customs and held for 12 months without a decision on its alleged obscenity and a declaration that its prolonged detention was and is unlawful.

2. The respondents purportedly justify the detention on the basis of the Customs Act.

PART II - THE FACTS

3. The salient facts in support of the applicants' motion are simple and incontrovertible.

4. The facts are that the plaintiffs sought to import certain printed material (books and magazines) for personal use and commercial resale; the material was detained in November of 1988 pursuant to the Customs Act. No decision regarding ~~its~~ the alleged obscenity of these materials has been ~~up~~ made up to November 15, 1989.

5. By virtue of the failure of the Deputy Minister to rule on the alleged obscenity, the applicant/plaintiff is unable to take the matter to the district Court for a judicial determination in accordance with the appeal provisions of the Customs Act.

s. ——— (ss. to allow Dept to hold it up)

6. The Applicants, by motion, seek ~~an order by way of interlocutory relief that the goods be returned to them forth with, pending trial of the issues involved, or the alternative, a declaration that the goods having been detained 9 months have been detained unlawfully.~~

here we get around Gould. eg. ch 5 quo. = mandamus Interim Relief

Reverse Ans Canada

Rule

Interlocutory Relief

7. The relief sought by motion is interlocutory to applicant/plaintiff suit against the respondent/defendants which suit seek inter alia:

a) damages for breach of the plaintiffs' right of freedom of expression under the Charter of Rights and Freedoms;

b) a declaration that the system of prior restraint of freedom of expression by means of the pyramid of detention provisions in the Customs Act infringes the Charter, sec. 2(b) 24.52;

c) an order that the detained goods be returned to the plaintiffs forthwith;

d) further, and in the alternative, a Declaration that a decision of the Deputy Minister pursuant to Customs Act section ____ must be made promptly with 21 days of the seizure of allegedly obscene goods.

8. The interlocutory motion seeks relief and raises issues more narrow than that address in the main action. The essence of the interlocutory application is that the protracted delay by the Deputy Minister in making a decision under section _____ of the Customs Act invalidates his continued detention of the goods involved.

9. The main action raises the issue whether the system of "customs censorship" under section _____ of the Customs Act should be declared of one force and effect.

PART III - THE LAW

10. The sections of the Customs Act and Customs Tariff Act which authorize the detention of allegedly obscene material prima facie have been found to constitute an infringement of freedom of expression under section 2 (b) of the Charter. They deprive the applicant, and others, of the right to read and/or sell printed material. Any legislative or administrative scheme which does this even temporarily must be justified under section 1 of the Charter.

Re Lusher and Deputy Minister, Revenue Canada, Customs and Excise (1985), 15 C.R.R. 167

Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983) 41 O.R. (2d) 583

11. The meaning of "reasonably necessary and demonstrably justified" in section 1 of the Charter has been expanded in R vs Oakes (1983) 40 O.R. (2d) 660:

> 1. The connection between the proved fact and the presumed fact must at least be such that the existence of the presumed fact rationally tends to prove that the presumed fact also exists. MARTIN J.A. at 672

2. The presumed fact must also be one which is rationally open to the accused to prove or disprove. MARTIN J.A. at 672

3. A rational connection between the proved fact and the presumed fact where the proved fact raises a probability that the presumed fact exists.

12. The applicant asserts that the Deputy Minister's failure to decide this issue for a period of a year cannot be seen as a "reasonable limit" on freedom of expression because of this delay. The applicant further asserts that only a prompt decision by those exercising authority under the Customs Act ~~thus allowing the~~ in such manner the applicant is given access to the Court for a proper judicial determination could be found to be a "reasonable limit" within the meaning of section 1. Freedman vs State of Maryland (1965) 380 U.S. 51

13. The applicant further asserts that the failure to decide, or the delay in deciding by the Deputy Minister cannot be "demonstrably justified" in light of the alternate Criminal Code provisions which apply. Even if the material in question is released it is subject to seizure under section ~~118~~ 164 of the Criminal Code and prosecution under section ~~159~~ 163 and punishment under s. 169

14. In assessing the "balance of convenience" regarding the determination of the interlocutory application the applicant ~~put~~ relies ~~reliance~~ on two factors. First, this is a continuing violation of their ~~civil~~ rights. ~~Second~~, the balance of convenience weighs heavily against the respondents given the alternate Criminal Code proceedings readily available.

PART IV - ORDER SOUGHT

15. The applicant seeks an interlocutory order that the material in question be released or such other remedy as the Court deems just.

All of which is respectfully submitted.

Charles Campbell
Of counsel for the Applicants